STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

KELVIN WILLIS,

Defendant-Appellant.

Case No. 15-010530-01-FH
CofA#: 334398
SCt#:

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT OF JURISDICTION

The Michigan Supreme Court has jurisdiction pursuant to MCR 7.303(B) concerning an appeal after the Michigan Court of Appeals rendered its decision. Defendant-Appellant Kelvin Willis was found guilty on June 20, 2016 of Child Sexually Abusive Activity; Possession Of Under 25 Grams Of A Controlled Substance; and Distributing Obscene Material To A Minor. ("Judgment Of Sentence Commitment To Department Of Corrections Amended," 8/8/16.) On July 15, 2016, Mr. Willis was sentenced to imprisonment within the custody of the Michigan Department of Corrections. (Id.)

Mr. Willis requested the appointment of appellate counsel on July 22, 2016. ("Claim Of Appeal And Order Appointing Counsel," 8/3/16.) Appellate counsel was appointed on August 3, 2016. (Id.)

After briefing and oral argument, the matter was decided by the Michigan Court of Appeal, affirming the convictions and sentences in a Published Opinion on January 11, 2018. People v. Willis, ___ Mich App ___; No. 334398, 2018 WL 385068 (Mich. Ct. App. Jan. 11, 2018). A motion for reconsideration was denied on February 8, 2018. (Court of Appeals' "Order," No. 334398, 2/8/18.)

STATEMENT OF QUESTIONS PRESENTED

I. WERE MR. WILLIS' DUE PROCESS RIGHTS VIOLATED WHEN HE WAS CONVICTED OF CHILD SEXUALLY ABUSIVE ACTIVITY WITHOUT SUFFICIENT EVIDENCE TO PROVE THE OFFENSE BEYOND A REASONABLE DOUBT WHEN THE TRIAL COURT GAVE THE JURY A NON-STANDARD INSTRUCTION THAT DID NOT CONFORM TO THE STATUTE?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court says "no."

The Court of Appeals says "no."

II. WAS MR. WILLIS DENIED A FAIR TRIAL BY THE COURT'S DENIGRATION OF THE DEFENSE AND DEFENSE COUNSEL, SHOWING A PARTIALITY TOWARDS THE PROSECUTION?

Defendant-Appellant says "yes."

Plaintiff-Appellee says "no."

The trial court says "no."

The Court of Appeals says "no."

STATEMENT OF FACTS

Overview

Defendant-Appellant Kelvin Willis was charged with Child Sexually Abusive Activity (2 Counts); Possession Of Under 25 Grams Of A Controlled Substance; and Distributing Obscene Material To A Minor. ("Information Felony," 11/19/15.) He ended up being convicted by a jury of one count of Child Sexually Abusive Activity; Possession Of Under 25 Grams Of A Controlled Substance; and Distributing Obscene Material To Minor. (Transcript, "Jury Trial," pp 6-9, 7/20/16.) He was acquitted of one count of Child Sexually Abusive Activity. (Id., p 6.) The trial court sentenced Mr. Willis to 15 years to 40 years to the custody of the Michigan Department of Corrections. (Transcript, "Sentencing," pp 9, and 15-16, 7/15/16.)

The case involves an allegation made by 16-year old Ali Aoun, who said he was solicited for a sexual act. (Transcript, "Preliminary Examination, pp 6-10, 12/18/15.)

Pretrial Proceedings

Ali Aoun testified at the Preliminary Examination regarding the allegations and, after arguments, the district court judge was unconvinced that the offenses of Child Sexually Abusive Activity had occurred, relying upon the statute. (Id., pp 38-39.) The district judge states:

> The Court, having had an opportunity to review the authority referenced by the People, is of the opinion that the charged violations in Counts 1 and 2 would, in fact, require some evidence – competent evidence that there be a persuasion, inducement, enticement, coercion causing or knowingly allowing a child under the age of eighteen to engage in a sexually abusive activity **for the purpose of producing child sexually abusive material**; as the child sexually abusive material is defined under MCL 750.145c(o), it would include a depiction made or produced by electronic, mechanical, or other means, including a developed or underdeveloped photograph, etcetera, picture, film, slide, video – in other words, some form of an image to be produced or reproduced. And the Court does not believe that the case law cited by the People-- it is persuasive to the contrary. The statute starts to be read literally where they can be read where the language is plain and the ordinary meaning leads to an interpretation that is clear on its face. There is no ambiguity. There's no going behind the words of a legislature. A required element in Count 1 and 2 is **for the purpose of producing such material, it's clear on its face**.

(Id.) (Emphasis added.)

Mr. Willis was bound over on the remaining charges of Possession Of Under 25 Grams Of A Controlled Substance, and Distributing Obscene Material To Minor. (Id., pp 39-40.) Additionally, the court granted the prosecution's

request to add two counts of Engaging The Services Of A Minor For Prostitution. (Id., pp 40-42.)

In the circuit court, the judge had a differing view than the district court judge when the circuit judge granted a prosecution motion to amend the charges. (Transcript, "Final Conference & Motions," 2/24/16.) After a review of a non-standard jury instruction (prepared by a Kent County Assistant Prosecutor) and a review of the preliminary examination transcript, the court determined the district judge erred as a matter of law in dismissing the counts of Child Sexually Abusive Activity. (Id., pp 5, 15-17.) In rendering its decision, the court states: "[T]here's no requirement under the statute that material such as video, pictures or any other type of material has to be produced, that the sexually abusive activity is a broader act, has a broader definition . . . ." (Id., p 16.) In making its ruling, the court relies upon the prosecution's cited authority of People v Aspy, 292 Mich App 36 (2011). (Id., pp 13-17.)

In addition to the added charges, over objection, the court ruled it would be allowing into evidence alleged prior acts of Mr. Willis, which included two individuals who were between the ages of four and six when the incidents occurred to them in 1990 and 1997. (Transcript, "Final Conference," pp 5-9, 3/9/16; "Final Conference," pp 3-4, 3/15/16.)

A plea offer, which was rejected, was extended to Mr. Willis that carried a sentence of seven years to 30 years. (Id., p 4.) Defense counsel admitted on the record that "if this case goes to trial I would – and I've indicated to Mr. Willis I don't believe that I would be the correct attorney to be of assistance for him to fight these particular charges. . . . I do not believe that I am the right person to assist Mr. Willis in this trial. I don't think having me as a lawyer in this courtroom benefits Mr. Willis." (Id., pp 4 and 6.) Rather than file a motion to withdraw, defense counsel filed a motion to disqualify the trial judge. (Transcript, "Motion," p 3, 3/16/16.)

Trial counsel argued that she had a difficult time representing her clients in different matters before this same judge and felt her client would not be treated fairly in the present case, mentioning: "I absolutely believe you are biased against this particular attorney and I know we've enjoyed a relationship before we got in this courtroom where we tried cases together." (Id., pp 4-8.) The trial judge denied the motion for disqualification, which was reviewed by the Chief Judge and affirmed. (Id., pp 16-35; "Motion," pp 8-14, 3/29/16.)

Jury Trial

Trial commenced on June 13, 2016. (Transcript, "Jury Trial," 6/13/16.) Defense counsel requested an adjournment due to receiving over 700 pages of information the previous day from the prosecution, which came from Mr. Willis' phone. (Transcript, "Jury Trial," pp 4-5, 6/14/16.) Defense counsel said there was information within the documents that could help Mr. Willis and that she was unable to review all of the documents received. (Id., p 5.) Rather than adjourn the trial, arrangements were made so that the defense could review and print the material. (Id., pp 10-12.)

Prior bad acts evidence involved Christian Becton testifying as to being sexually assaulted by Mr. Willis in 1990 when he was five or six years old, describing in detail the event occurring in 1990. (Id., pp 42-44.) Also, Brandon Walker testified when he was four years old in 1997 he was fondled, on top of his clothesby Mr. Willis, saying Willis did the same to a friend who was five years old at the time in 1997. (Id., pp 48-53.)

The subject of the present case, Ali Aoun, said when he was sixteen years old on August 12, 2015 he was living near an apartment complex at 4114 Calhoun in Dearborn; that he had contact with a person named Paul and Mr. Willis; and that Mr. Willis asked him how old he was and asked Ali for his phone number. (Id., pp 63-65.) Aoun and Willis exchanged phone

numbers; Aoun called Mr. Willis; and Aoun voluntarily entered into Mr. Willis' apartment. (Id., pp 66-67.) Another person, Tonya Battle, was within the apartment; Mr. Willis and Tonya got into an argument; they both left the apartment; and Mr. Willis came back, alone, according to Aoun. (Id., pp 68-69.) Aoun testified he was sitting on the couch; Mr. Willis put his hand around him; and that he was showed a video from Mr. Willis' phone of two men having intercourse. (Id., p 69.) He said Mr. Willis "told me, I'll give you twenty-five dollars to finger your butt hole and masturbate on you . . . then he said, I'll give you a hundred dollars to have sexual intercourse with you." (Id., p 70.) Aoun declined the offers. (Id.) Mr. Willis left the apartment and Aoun left out the back door, where he ran into some guys; that he told the guys what had happened; and that the police were called. (Id., pp 71-72.) Although there was no sexual contact between Mr. Willis and Ali Aoun, four officers responded to the run regarding "a boy had reported that he was molested." (Id., p 153.) Aoun stated he told the police what had occurred. (Id., p 72.)

Aoun admitted at the preliminary examination he testified what he was shown from Mr. Willis' phone, stating: "I was sitting down and he pulled out his phone and showed me, **I think it was a porn video** . . ." (Id., pp 84-85.) (Emphasis added.) He later clarified that the video he saw

was "[t]wo men having sexual intercourse." (Id., pp 102-03.) He could not describe what he was shown from Mr. Willis' phone, stating it was shown to him for "[n]ot even ten seconds." (Id., p 96.) He admitted there was no sexual contact with Mr. Willis. (Id., pp 100-01.) Aoun indicated that phone records showed eleven calls were made by him, which he denied and said only one call was made. (Id., pp 117-18.)

An interview with Mr. Willis was conducted, recorded by Detective Leah Bronson, and played for the jury. (Id., pp 139-42 and 147-48.) Detective Bronson mentioned Mr. Willis denied the allegations made against him. (Id., pp 156-57.) Detective Bronson stated there were five or six sex offenders in the apartment building; that Mr. Willis was the only one of them working; and that people would say things about him to get money out of him. (Id., pp 148-49.) Detective Bronson mentioned Mr. Willis denied the allegations made against him. (Id., pp 156-57.)

An extraction of Mr. Willis' cell phone revealed a cell phone number with a name associated with "Al," and that there was one call from "Al's" phone, two calls from Mr. Willis' phone to Al's phone, and text messages from Mr. Willis' phone to Al's phone. (Transcript, "Jury Trial," pp 14, 22-29, 6/15/16.) Eleven videos were on Mr. Willis' phone and three images were pornographic. (Id., pp 33-34.)

During the trial, the defense requested an adjournment to obtain an expert in Android cell phone devices. (Id., p 62.) The court denied the motion, stating: "We have no way of knowing whether a different expert, if there is one out there, that they would give any different opinion . . . ." (Id., p 67.) Defense counsel asked the court to deny the prosecution's request to admit the video because it was supplied to the defense on the day of jury selection. (Id., pp 68-70.) Over objection, the court admitted the playing of the video. (Id., pp 93-94.)

Although there was no sexual contact between Mr. Willis and Ali Aoun, four officers responded to the run regarding "a boy had reported that he was molested" and Mr. Willis was arrested for criminal sexual conduct. (Transcript, "Jury Trial," p 153, 6/14/16; "Jury Trial," p 120, 6/15/16.) Mr. Willis was taken to the police station where it was discovered Mr. Willis had cocaine and a cell phone on his possession. (Id., pp 122-23.)

Detective Leah Bronson testified Ali Aoun provided additional information at the Kid's Talk interview where he alleged Mr. Willis offered money on two occasions instead of one and "[w]e're going to believe him." (Id., pp 143-46.) She admitted, however, a motivating factor in Aoun's story could have been him being in trouble for breaking curfew. (Id., pp 155-56.) Bronson mentioned Mr. Willis had a prior offense of sexual conduct with a

victim between the ages of 10 and 12. (Transcript, "Jury Trial," p 12, 6/16/16.) Mr. Willis was allowed, however, to have contact with minors even though he was on the sex offender's list. (Id., p 29.)

Tonya Battle testified she did not want to be in court but was present "because an innocent man is being accused of something that I know he didn't do." (Id., pp 33-34.) She mentioned Aoun said his age was 18 years old, and she denied seeing Mr. Willis show anything from his phone to Aoun and denied hearing any propositions to Aoun. (Id., pp 39-40.) Battle said she was present when Mr. Willis was arrested and that she spoke to officers that evening, telling them there was no inappropriate contact between Mr. Willis and Aoun. (Id., pp 46-49.)

Discussions occurred regarding the videos in the case and, over objection, the court played only a portion of the videos of the night of the arrest and the morning thereafter. (Transcript, "Jury Trial," pp 3-21, 6/17/16.)

Sergeant Brian Kapanowski testified as responding and speaking to Ali Aoun; to telling Aoun that his story did not make sense; and that the only thing of a sexual nature told by Aoun was an offer of $25 to finger his anus by Mr. Willis. (Id., pp 24-33.)

The court remarked, in front of the jury, that it would not allow defense counsel to question Sergeant Kapanowski about his wrong assumptions of Mr. Willis not being able to be around minors. (Id., pp 40-42.) Outside the presence of the jury, defense counsel made her objections about being unfairly treated by the court in front of the jury, stating: "I think the proceedings have been tainted. . . . I just don't think at this particular time this man is able to get a fair trial, whether he did it or didn't do it." (Id., pp 42-47.) Defense counsel made further comments, stating: "At this point in time I'm doing absolutely nothing but sitting here. . . Judge, at this point that this particular trial turned . . . If it hurts Mr. Willis' appellate record, Judge, I'm going to leave everything for this Court to do at this particular time for appellate purposes." (Id., pp 51-52.)

The prosecution rested, and Mr. Willis' motion for a directed verdict was denied. (Id., pp 58-65.) Regarding the jury instructions on the definition of "Child Sexually Abusive Activity," the defense requested the statutory definition, which was denied. (Id., pp 77-82.) Mr. Willis was denied a lesser instruction of Engaging The Services Of A Minor For Prostitution. (Id., pp 84-86.)

After closing arguments, the court gave the following jury instruction as to what constitutes "Child Sexually Abusive Activity":

First, that the Defendant attempted, prepared or attempted to make or arrange to have someone engage in sexually abusive activity with a person. Second, that this person was eighteen years of age.

Okay. On a separate page I've defined sexually abusive activity, but I didn't do it on the same page as Count I. So if you need to look it up again it's on another page, okay.

In Count II the Defendant is charged with a second count of child sexually abusive activity. So in Count II the Defendant is charged with a crime known as child sexually abusive activity. The Defendant has plead not guilty to this charge. To prove this charge the prosecution must prove each of the following elements beyond a reasonable doubt and there are two elements for Count II.

First, that the Defendant attempted, prepared or attempted to make or arrange to have someone engage in sexually abusive activity with a person. Second, that this person was under eighteen years of age.

So on the next page I've defined I have the definition of child sexually abusive activity that applies to Count I and Count II.

Sexually abusive activity is defined by law as a child engaging in any of the following sexual acts. A, sexual intercourse whether genital, anal or oral. B, fondling of a person's clothed or unclothed genitals, pubic area, buttocks or female breasts for the purpose of sexual gratification. C, masturbation.

And then down below that I have a cautionary instruction which reads, mere desire to commit those acts is not a crime. The **Defendant must of either, one, actually attempted to commit those acts or, two, have made preparation for coming those acts**.

(Id., pp 134-36.) (Emphasis added.)

This instruction was objected to by the defense. (Id., p 153.)

After a full day of deliberations, the jury found Mr. Willis guilty of one count of Child Sexually Abusive Activity; Possession Of Under 25 Grams Of A Controlled Substance; and Distributing Obscene Material To Minor. (Transcript, "Jury Trial," pp 6-9, 7/20/16.) He was acquitted of one count of Child Sexually Abusive Activity. (Id., p 6.)

On July 15, 2016, Mr. Willis was sentenced to 15 years to 40 years to the custody of the Michigan Department of Corrections. (Transcript, "Sentencing," pp 15-16, 7/15/16.) Mr. Willis requested the appointment of appellate counsel on July 22, 2016. ("Claim Of Appeal And Order Appointing Counsel," 8/3/16.) Appellate counsel was appointed on August 3, 2016. (Id.)

Mr. Willis raised three issues in his appeal to the Michigan Court of Appeals. (Defendant-Appellant's Brief On Appeal," 12/31/16.) First, Mr. Willis argued his conduct did not meet the definition of Child Sexually Abusive Activity; therefore, there was insufficient evidence to support the conviction. (Id.) Second, Mr. Willis was denied a fair trial due to judicial bias. (Id.) And, third, Mr. Willis raised a sentencing issue. (Id.)

The Court of Appeals issued a published decision on January 11, 2018, affirming the convictions and sentence. Willis, supra. The Court of Appeals ruled, based on its interpretation of the statute and relying upon two Court of Appeals' decisions, "the evidence was factually sufficient to show that defendant arranged for, or attempted to arrange or prepare for, child sexually abusive activity with the 16-year old victim." Id. The Court further determined there was no judicial bias, and that the sentence was proper. Id.

ARGUMENT

Defendant-Appellant Kelvin Willis raises two issues in this appeal. First, Mr. Willis cannot be convicted of Child Sexually Abusive Activity as there was insufficient evidence since his actions do not meet the statutory definition of proscribed conduct. Second, judicial bias denied Mr. Willis of a fair trial. The first issue involves a legal principle of major significance to the state's jurisprudence because according to the Court of Appeals' interpretation of the Child Sexually Abusive Activity statute (MCL 750.145c(2) the age of consent is now effectively changed to 18 years of age. Further, Mr. Willis suggests that the decision of the Court of Appeals is clearly erroneous and will cause material injustice since judicial partiality denied him a fair trial.

I. MR. WILLIS' DUE PROCESS RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF CHILD SEXUALLY ABUSIVE ACTIVITY WITHOUT SUFFICIENT EVIDENCE TO PROVE THE OFFENSE BEYOND A REASONABLE DOUBT WHEN THE TRIAL COURT GAVE THE JURY A NON-STANDARD INSTRUCTION THAT DID NOT CONFORM TO THE STATUTE

Defendant-Appellant Kelvin Willis' conviction of Child Sexually Abusive Activity must be vacated as he was convicted without sufficient evidence. The evidence to convict was insufficient to prove guilt beyond a reasonable doubt. The instructions read to the jury did not conform to the statute, leading the jury to a conviction on less than sufficient evidence.

An issue involving the interpretation and application of a statute is subject to de novo review. People v King, 297 Mich App 465, 482; 824 NW2d 258, 267 (2012). Further, this Court conducts a de novo review of a verdict to determine whether it is supported by constitutionally sufficient evidence. People v Patterson, 428 Mich 502; 410 NW2d 733 (1987). The United States Supreme Court has held the Due Process Clause of the Constitution protects the accused in that each element of a crime must be proven by sufficient evidence beyond a reasonable doubt. In re Winship, 397 US 358, 364; 90 SCt 1068; 25 LEd2d 368 (1970).

Mr. Willis was wrongly convicted of Child Sexually Abusive Activity, MCL 750.145c(2). This statutory provision states:

> (2) A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity **for the purpose of producing any child sexually abusive material**, or a person who arranges for, produces, makes, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, **if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child**, or that person has not taken reasonable precautions to determine the age of the child.

MCL 750.145c(2). (Emphasis added.)

Admittedly, the statute is somewhat convoluted, but the standard jury instruction is not, as it states:

> **M Crim JI 20.38 Child Sexually Abusive Activity – Causing or Allowing**
>
> (1) The defendant is charged with the crime of causing or allowing a child to engage in sexually abusive activity **in order to create or produce child sexually abusive material**. To prove this charge, **the prosecutor must prove each of the following elements beyond a reasonable doubt**:
> (2) First, that the defendant [persuaded / induced / enticed / coerced / caused / knowingly allowed] a child under 18 years old to engage in child sexually abusive activity.
> (3) Child sexually abusive activity includes:
> [Choose any of the following that apply:]
> (a) sexual intercourse, which is penetration of a genital, oral, or anal opening by the genitals, mouth, or tongue, or with an artificial genital, whether the intercourse is real or simulated, and whether it is between persons of the same or opposite sex, or between a person

and an animal, [and/or]
(b) erotic fondling, which is the touching of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for the purpose of sexual gratification or stimulation of any person involved, but does not include other types of touching, even if affectionate, [and/or]
(c) sadomasochistic abuse, which is restraining or binding a person with rope, chains, or any other kind of binding material; whipping; or torturing for purposes of sexual gratification or stimulation, [and/or]
(d) masturbation, which is stimulation by hand or by an object of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for sexual gratification or stimulation, [and/or]
(e) passive sexual involvement, which is watching, drawing attention to, or exposing someone to persons who are performing real or simulated sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity for the purpose of sexual gratification or stimulation of any person involved, [and / or]
(f) sexual excitement, which is the display of someone's genitals in a state of stimulation or arousal, [and/or]
(g) erotic nudity, which is showing the genital, pubic, or rectal area of someone in a way that tends to produce lewd or lustful emotions.
(4) **Second**, that the defendant caused or allowed the person to engage in child sexually abusive activity **for the purpose of producing or making child sexually abusive material**. Child sexually abusive materials are pictures, movies, or illustrations, made or produced by any means, of [a person under 18 years old / the representation of a person under 18 years old] engaged in sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, and/or erotic nudity.
(5) Third, that the defendant knew or reasonably should have known that the person was less than 18 years old, or failed to take reasonable precautions to determine whether the person was less than 18 years old.

M Crim JI 20.38. (Emphasis added.)

Both the statute and jury instruction make clear that there has to be a purpose of producing or making child sexually abusive material. MCL 750.145c(2); M Crim JI 20.38. The trial judge, in granting the motion to add the charges and in reading an abbreviated version of what it believed the statute proscribed, violated Mr. Willis' rights. The charge read to the jury was as follows:

> First, that the Defendant attempted, prepared or attempted to make or arrange to have someone engage in sexually abusive activity with a person. Second, that this person was eighteen years of age.
>
> Okay. On a separate page I've defined sexually abusive activity, but I didn't do it on the same page as Count I. So if you need to look it up again it's on another page, okay.
>
> In Count II the Defendant is charged with a second count of child sexually abusive activity. So in Count II the Defendant is charged with a crime known as child sexually abusive activity. The Defendant has plead not guilty to this charge. To prove this charge the prosecution must prove each of the following elements beyond a reasonable doubt and there are two elements for Count II.
>
> First, that the Defendant attempted, prepared or attempted to make or arrange to have someone engage in sexually abusive activity with a person. Second, that this person was under eighteen years of age.
>
> So on the next page I've defined I have the definition of child sexually abusive activity that applies to Count I and Count II.
>
> Sexually abusive activity is defined by law as a child engaging in any of the following sexual acts. A, sexual intercourse whether genital, anal or oral. B, fondling of a person's clothed or unclothed genitals, pubic area, buttocks or female breasts for the purpose of sexual gratification. C, masturbation.
>
> And then down below that I have a cautionary instruction which reads, mere desire to commit those acts is not a crime. The Defendant must of either, one, actually attempted to commit those acts or, two, have made preparation for coming those acts.

(Transcript, "Jury Trial," pp 134-36, 6/17/16.)

This instruction to the jury was incomplete as it eliminated the element that the activity must be "for the purpose of producing any child sexually abusive material." MCL 750.145c(2); M Crim JI 20.38.

Considering the fact that the jury instructions were amended in June 2016 to make clear it is the production of child sexually abusive material that is prohibited, the court errs in relying on the 2011 case of People v Aspy, 292 Mich App 36 (2011) when granting the motion to amend the charge and in reading its abbreviated version of the elements. In Aspy, the issue was whether or not Michigan had territorial jurisdiction. It was never argued whether or not there was sufficient evidence to convict as the defendant in that case conceded to engaging in child sexually abusive activity, but argued it was not in Michigan: "Defendant admits that while in Indiana he used his computer to commit child sexually abusive activity." Id., 292 Mich App at 43.

Even when considered in the light most favorable to the prosecution, as required by People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979), the prosecutor failed to prove the critical elements beyond a reasonable doubt. It must be remembered that the age of consent in Michigan is 16. See, MCL 750.520b; MCL 750.520c; MCL 750.520d; and

MCL 750.520e. The statutory interpretation as proposed by the Court of Appeals, trial court, and prosecution would make it a crime to engage in sexual conduct with a sixteen or seventeen-year-old.

To the extent that the statute contains ambiguity, the rule of lenity applies. Where a statute is ambiguous, the rule of lenity requires the ambiguity be resolved in favor of lenity and against the imposition of harsher punishment. People v Bergevin, 406 Mich 307; 279 NW2d 528 (1979); United States v Granderson, 511 US 39; 114 S Ct 1259; 127 L Ed 2d 611 (1995). The reviewing court should apply lenity if doubt persists after reviewing the language of the statute, legislative history, and policies. Moskal v United States, 498 US 103, 108; 111 S Ct 461, 465; 112 L Ed 2d 449 (1990).

Both the plain language of the statute, jury instructions, and proper application of grammatical rules reveal the Legislative intent is clear. Mr. Willis can only be convicted if the child sexually abusive activity is for the purpose of producing any child sexually abusive material. No such evidence was admitted or determined by the jury. Nonetheless, if after the Court reviews the statute, history and policies, it is left with ambiguity, lenity requires narrowly construing the statute. Bergevin, supra. For the above reasons, Mr. Willis' conviction of Child Sexually Abusive Activity must be

vacated since there is no evidence of an activity for the purpose of producing any child sexually abusive material.

The Court of Appeals disagrees, saying "the evidence was factually sufficient to show that defendant arranged for, or attempted to arrange for or prepare for, child sexually abusive activity with the 16-year old victim." People v. Willis, ____ Mich App ___, No. 334398, 2018 WL 385068, Slip Op. p 3, (Mich. Ct. App. Jan. 11, 2018). A fair reading of the Opinion by the Court of Appeals would be that the act of attempting to engage in sex with a person under 18 years old, even though the person was over the age of consent at 16 years old, satisfies the elements for a conviction of Child Sexually Abusive Activity. Essentially, this interpretation by the Court of Appeals changes the age of consent from 16 to 18 years of age. See, MCL 750.520b; MCL 750.520c; MCL 750.520d; and MCL 750.520e. Mr. Willis submits the Court of Appeals incorrectly interprets MCL 750.145c(2).

The Court of Appeals relies upon two cases, both decided by the Court of Appeals-- one decided in 2006 and the other in 2011. These cases are People v Adkins, 272 Mich App 37; 724 NW2d 710 (2006) and People v Aspy, 292 Mich App 36; 808 NW2d 569 (2011). In its Opinion in the present case, the Court mentions Mr. Willis conduct falls within the statute, and relies upon Aspy in support of affirming, stating:

. . . [W]e reject defendant's argument that MCL 750.145c is limited to conduct involving the production of sexually abusive material. The allegations against defendant squarely place him within the group of persons on whom MCL 750.145c(2) imposes criminal liability.

Turning to the sufficiency of the evidence to support defendant's conviction, we conclude that, viewed in a light most favorable to the prosecution, the evidence was factually sufficient to show that defendant arranged for, or attempted to arrange or prepare for, child sexually abusive activity with the 16-year-old victim. The evidence showed that the 52-year-old defendant invited the 16-year-old victim into his apartment, showed the victim a pornographic video of two men engaging in sexual intercourse, and then offered the victim $25 to allow defendant to insert his fingers into the victim's anus while he masturbated, and later offered the victim $100 to engage in sexual intercourse. This was sufficient for a rational tier of fact to find that the essential elements of child sexually abusive activity were proven beyond a reasonable doubt. As discussed earlier, the prosecution was not required to prove that defendant's conduct involved the production of child sexually abusive material.

Our conclusion is supported by People v Aspy, 292 Mich App 36; 808 NW2d 569 (2011). In that case, the defendant, who was from Indiana, communicated in a website chatroom with a woman pretending to be a 14-year-old girl. Id. at 38. Eventually, the defendant and the woman pretending to be the 14-year-old girl made plans to meet in person, and when the defendant arrived at the address provided, the police arrested him. Id. at 39-40. The defendant was subsequently charged and convicted under MCL 750.145c(2). Id. at 38. Defendant in this case correctly points out that Aspy dealt with whether a Michigan court had jurisdiction over the Aspy defendant, but, as part of that determination, **the parties in Aspy disputed**, and the Aspy Court had to determine, **whether the prosecution presented sufficient record evidence to support a criminal prosecution**. Id. at 42. This Court concluded that "the prosecution presented more than sufficient evidence to allow a rational jury to conclude that defendant prepared and attempted to commit child sexually abusive activity . . . ." Id. at 42-43. Relying on Adkins, the Aspy Court concluded that MCL 750.145c(2) only requires that a defendant prepare for child sexually abusive activity and "'does not require that those preparations actually proceed to the

> point of involving the child.'" Id. at 43, quoting Adkins, 272 Mich App at 46. The Aspy Court held that there was sufficient evidence that the "defendant acted consistently with the preparations he had made to commit child sexually abusive activity" by driving "into Michigan to a location where he intended to meet a child whom he believed to be under the age of 18" and "engage in behavior wrongful under MCL 750.145c(2)." Aspy, 292 Mich App at 43-44.

People v Willis, ___ Mich App ___, Court of Appeals' Published Opinion, docket #334398, 1/11/18.) (Emphasis added.)

Two of the most prominent distinguishing factors between Aspy and the present case are as follows: First, the Court in the present case errs in saying the parties disputed whether child sexually abusive activity occurred because the defendant in Aspy **admitted** to engaging in child sexually abusive activity, while Mr. Willis adamantly **denies** engaging in such activity. Second, the alleged victim in Aspy was under the age of consent at 14-years old, while the subject in the present case is 16-years old and over the age of consent. In Aspy, the Court remarks that:

> **Defendant admits that while in Indiana he used his computer to commit child sexually abusive activity**. Defendant, however, fails to acknowledge he also prepared to commit child sexually abusive activity while in Michigan, not Indiana. MCL 762.2(2)(a) provides that Michigan has jurisdiction over any crime in which any act constituting an element of the crime is committed within Michigan. MCL 750.145c(2) "'does not actually require conduct involving a minor. Rather, it only requires that the defendant prepare to arrange for child sexually abusive activity. The statute does not require that those preparations actually proceed to the point of involving a child.'" People v. Adkins, 272 Mich App 37, 46, 724 N.W.2d 710 (2006), quoting Thousand, 241 Mich App at 117, 614 N.W.2d 674 (emphasis omitted). There is evidence that defendant acted

> consistently with the preparations he had made to commit child sexually abusive activity. He drove into Michigan to a location where he intended to meet a child whom he believed to be under the age of 18. There is substantial evidence that he intended to take a girl under the age of 18 to a reserved campsite and engage in behavior wrongful under MCL 750.145c(2). Since preparation to arrange for child sexually abusive activity is an element of MCL 750.145c(2), we reject defendant's contention that Michigan lacked territorial jurisdiction for his prosecution under MCL 762.2.

People v Aspy, 292 Mich. App. 36, 43–44, 808 N.W.2d 569, 574–75 (2011). (Emphasis added.)

The Aspy Court relies on People v Adkins, 272 Mich App 37 (2006), a plea-based case and another case where the victim was under the age of consent at 14-years old. In Adkins, the Court found the factual basis for a plea to be sufficient, saying: "These admissions reflect that defendant 'attempted or prepared ... to arrange for ... child sexually abusive activity,' and thus place him within the plain language of § 145c(2). Specifically, defendant admitted that he communicated in an explicitly sexual manner with perceived 14–year–old Eric in an attempt to arrange to meet him for the purpose of engaging in sexual contact." People v. Adkins, 272 Mich. App. 37, 44; 724 N.W.2d 710, 715 (2006). And, Adkins relied upon People v Thousand, 241 Mich. App. 102, 104–105, 113–117, 614 N.W.2d 674 (2000), a case on interlocutory appeal and still another case where the purported victim was 14-years old.

The Court of Appeals' interpretation of MCL 750.145c(2) in the present case makes it illegal for anyone to engage in a sexual act with someone over 16-year old and under 18-years old, even though these people would be over the age of consent. In essence, the Court changes the age of consent to 18-years old—a place that should be left to the Legislature. See, MCL 750.520b; MCL 750.520c; MCL 750.520d; and MCL 750.520e.

Mr. Willis' conduct does not meet the statutory definition of Child Sexually Abusive Activity. Therefore, the conviction on this count must be vacated.

II. MR. WILLIS WAS DENIED A FAIR TRIAL BY THE COURT'S DENIGRATION OF THE DEFENSE AND DEFENSE COUNSEL, SHOWING A PARTIALITY TOWARDS THE PROSECUTION

Defendant-Appellant Kelvin Willis was denied a fair trial. He was denied a fair trial because the trial judge, through his rulings and statements, demonstrated partiality against Mr. Willis and his counsel prior to trial and during the trial in front of the jury. The question whether judicial misconduct denied a defendant a fair trial is a question of constitutional law that this Court reviews de novo. People v. Pipes, 475 Mich. 267, 274; 715 N.W.2d 290 (2006); In re Susser Estate, 254 Mich.App. 232, 236–237; 657 N.W.2d 147 (2002). Once a reviewing court has concluded that judicial misconduct has denied the defendant a fair trial, a structural error has occurred and automatic reversal is required. Arizona v. Fulminante, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). See also, People v Stevens, 498 Mich. 162 (2015).

The recent case in Stevens notes the importance and the influence of a court's comments and demeanor when articulating a new standard for determining if a defendant has been denied a fair trial:

> A trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality. [People v. Wilson, 21 Mich.App. 36, 37-38; 174 N.W.2d 914 (1969)]. ("If an examination of the record reveals that the veil of judicial impartiality was pierced by the trial judge, the case must be reversed."); People v. Bedsole, 15 Mich.App. 459, 462, 166 N.W.2d 642 (1969) ("The

> veil of judicial impartiality should not have been pierced by the trial judge on this occasion."). A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party.

Stevens, 498 Mich 170-71.

The Steven's Court noted a factual analysis must take place and a single inappropriate act does not necessarily give the appearance of advocacy, but on occasion it will if the instance of misconduct is "so egregious that it pierces the veil of impartiality." The cumulative effect of errors should be determined if a defendant was denied a fair trial. Id. The Court mentions the totality of the circumstances must be viewed to determine if there was partiality:

> In evaluating the **totality of the circumstances**, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions.
>
> . . . .
>
> Judicial misconduct may come in myriad forms, including **belittling of counsel**, inappropriate questioning of witnesses, providing improper strategic advice to a particular side, **biased commentary in front of the jury**, or a variety of other inappropriate actions.

Id. (Emphasis added.)

The Court notes five areas to be considered by a reviewing Court: 1) nature of judicial intervention; 2) tone and demeanor; 3) scope of judicial intervention; 4) the extent to which a judge's comments or questions were directed at one side more than the other; and 5) curative instruction. Id., pp 172-78. All of these should be considered in the totality of the circumstances. Id. p 190.

Even prior to trial in the present case, there was an apparent riff between defense counsel and the trial judge that eventually found its way into the trial. (Transcript, "Final Conference," 3/9/16; "Final Conference," pp 3-4, 3/15/16.) Trial counsel stated "if this case goes to trial I would – and I've indicated to Mr. Willis I don't believe that I would be the correct attorney to be of assistance for him to fight these particular charges. . . . I do not believe that I am the right person to assist Mr. Willis in this trial. I don't think having me as a lawyer in this courtroom benefits Mr. Willis." (Id., pp 4 and 6.) Mentioning she had a difficult time representing her clients in different matters before this same judge, trial counsel was of the opinion that Mr. Willis would not be treated fairly: "I absolutely believe you are biased against this particular attorney and I know we've enjoyed a relationship before we got in this courtroom where we tried cases together." (Id., pp 4-8.)

Additionally, a combination of a number of rulings against Mr. Willis and his counsel, gives the impression of bias, providing evidence that the commentary in front of the jury directed against the defense was purposeful. For example, a request for an adjournment of the trial due to receiving, on the day of trial, over 700 pages of information from the prosecution from Mr. Willis' phone was denied. (Transcript, "Jury Trial," pp 4-5, 6/14/16.) A request for an expert in cellular phone analysis was denied. (Transcript, "Jury Trial," pp 62-69, 6/15/16.) Mr. Willis' request to suppress a video, again received the day of jury selection, was denied. (Id., pp 68-70 and 93-94.) All of these rulings against the defense despite the prosecution being in the wrong.

Most damning to Mr. Willis' rights came during an exchange in front of the jury. The court remarked, in front of the jury, that it would not allow defense counsel to question Sergeant Kapanowski about his wrong assumptions of Mr. Willis not being able to be around minors. (Id., pp 40-42.) The following transpires in the jury's presence:

> THE COURT: That's beyond that, Miss Diallo.
> MS. DIALLO [Defense counsel]: Okay.
> THE COURT: Hold on, one second. Okay. I just want to say that Michigan Rule of Evidence 6.11 [sic] says, that the Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.
> So as to, one, make the interrogation and presentation effective for the ascertainment of the truth; two, **avoid needless consumption of**

time as applies here. So that was the reason for my limiting this to what was on the video and that's my reason for stopping that last question.

MS. DIALLO: Thank you, Judge.

THE COURT: Okay.

MS. DIALLO: And, Judge, since you made the record in front of the jury I object.

THE COURT: **You know, all right, ladies and gentlemen, why don't you step into the jury room. You[r] objection is noted**.

MS. DIALLO: For the Court of Appeals in case it gets there.

THE COURT: All right. Do you have any further questions?

MS. DIALLO: I don't know if I can ask them, Judge.

COURT OFFICER: All rise for the Jury.

THE COURT: Okay. Step inside the jury room.

(11:49 A.M. the jury left the courtroom)

(Id., pp 40-42.) (Emphasis added.)

Outside the presence of the jury, defense counsel waged a bit of a sit-in and made objections about being treated by the court in front of the jury, stating: "I think the proceedings have been tainted. . . . I just don't think at this particular time this man is able to get a fair trial, whether he did it or didn't do it. . . . At this point in time I'm doing absolutely nothing but sitting here. . . Judge, at this point that this particular trial turned . . . If it hurts Mr. Willis' appellate record, Judge, I'm going to leave everything for this Court to do at this particular time for appellate purposes." (Id., pp 42-47 and 51-52.)

It is unclear why trial counsel's questioning was objectionable to the court since they were not objectionable to the prosecution. The trial court

was taking on the role of the prosecution, objecting to the questioning and steering the case away from a proper subject. The questioning, quite reasonable to ascertain the police officer's incorrect assumptions about Mr. Willis being around children, was an important fact for the jury to hear—Willis was not forbidden from being around minors.

The confrontational situation denied Mr. Willis of his right to a fair trial. It is visible from the record that the trial court improperly engaged in belittling defense counsel. This denied Mr. Willis' rights. See, People v. Cole, 349 Mich. 175, 200; 84 N.W.2d 711 (1957); see also, People v. Neal, 290 Mich. 123, 129; 287 N.W. 403 (1939) ("Pert remarks and quips from the bench have no place in the trial of a criminal case.")

The Stevens Court mentions that the "tone and demeanor" a judge displays in front of the jury can have a substantial impact "[b]ecause jurors look to the judge for guidance and instruction, they 'are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge.'" Quoting, In re Parkside Housing Project, 290 Mich. 582, 600;, 287 N.W. 571 (1939) The Stevens Court also noted the possibility, even without intending, for a court to deprive a party of a fair trial if the manner in which the judge conducts the case gives its view of the case.

In the present matter, as in Stevens, the trial court created "the appearance of advocacy or partiality against defendant." Defense counsel was shutdown when attempting to ask a legitimate question about the police officer's assumptions of Mr. Willis and his ability to be around children. This intervention was improper. Additionally, when trial counsel acquiesced to the trial court's intervening ruling by saying "Okay," the trial court goes the extra step of getting the court rule and reading the court rule to defense counsel in front of the jury. (Id.) The tone and demeanor of reading from a court rule was belittling, suggesting that defense counsel was engaging in a "needless consumption of time." (Transcript, "Jury Trial," pp 40-42, 6/15/16.) Further, in the same vein, when defense counsel objected, the tone and demeanor of the judge comes through, when stating: "**You know, all right, ladies and gentlemen, why don't you step into the jury room. You[r] objection is noted**." (Id.) (Emphasis added.)

There appears to be a demonstrated bias against the defense, which was seen in the court's pretrial and trial rulings. The prosecution never received the same condemnation, even though it provided belated discovery to the defense without just cause-- even as late as during the trial. Finally, there was a lack of curative instruction at the time of the intervention. The belated standard instructions during the charge to the jury cannot be seen as

curative. See, e.g., People v. Bruner, ___ Mich ___; No. 154779, 2018 WL 1526099, (Mich. Mar. 28, 2018) (limiting instruction being ineffective to cure the error.)

The proper remedy for this structural error, as was the case in Stevens, is a new trial. See, Fulminante, 499 U.S. at 309–310, 111 S.Ct. 1246 (noting the deprivation of the right to an impartial judge is a structural error and explaining that "[t]he entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial"). See also, People v. Anderson (After Remand), 446 Mich. 392, 404–405, 521 N.W.2d 538 (1994).

In its Opinion, the Court of Appeals fails to take into account the totality of the circumstances. It takes an isolated view of the dialogue the court had with trial counsel in front of the jury, disregarding all other aspects of bias—late discovery violation not addressed; failure to allow for an adjournment; denial of an expert; and a failure to condemn the prosecution when it was in error. All of this, leading up to the trial court asserting itself as a prosecutor by preventing defense questioning, shows a pattern of bias, shows a structural error, and shows Mr. Willis being deserving of a new trial.

CONCLUSION

Defendant-Appellant Kelvin Willis must have his convictions vacated. First, there was insufficient evidence to find Mr. Willis guilty of Child Sexually Abusive Activity. Second, judicial bias denied Mr. Willis of a fair trial. Vacating the conviction of Child Sexually Abusive Activity is the proper remedy on the first issue. A new trial is the proper remedy for the second issue.

Respectfully submitted,

Dated: April 1, 2018

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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

KELVIN WILLIS,

Defendant-Appellant.

Case No. 15-010530-01-FH
CofA#: 334398
SCt#:

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PROOF OF SERVICE

I, Ronald D. Ambrose, attorney for Defendant-Appellant Kelvin Willis, certify that on April 1, 2018 I served through first class mail, postage fully prepaid, a copy of the following documents upon counsel for Plaintiff-Appellee, Kym L. Worthy, addressed to Wayne County Prosecutor's Office, 1441 St. Antoine, 12th Floor, Detroit, MI 48226: 1) Defendant-Appellant's Application For Leave To Appeal; 2) Court of Appeals' Opinion; and 3) Order Denying Motion For Reconsideration; and 4) Notice Of Filing Appeal. Further, on this date, the Notice of Filing Appeal was served by regular mail to the Court of Appeals, addressed to PO Box 30022, Lansing, MI 48909-7522 and the Wayne County Circuit Court, addressed to 1441 St. Antoine, 9th Floor, Detroit, MI 48226.

Dated: April 1, 2018

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